Supreme Court, U.S.
FILED
NOV 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1835

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

JOINT APPENDIX

IRA REINER
District Attorney
County of Los Angeles

HARRY B. SONDHEIM
Head Deputy
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Counsel for
Respondent

PETITION FOR CERTIORARI FILED MAY 6, 1986
CERTIORARI GRANTED OCTOBER 14, 1986

117 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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CHRONOLOGY

1984

Jan 17 — Search warrant, authorizing search of respondent's residence, issued.

Jan 31 — Felony complaint No. A088619, charging respondent in five counts with bookmaking offenses, is filed in the Municipal Court of Beverly Hills Judicial District, County of Los Angeles.

April 12 — Hearing on motion to quash the search warrant, pursuant to California Penal Code Section 1538.5, conducted before magistrate in Municipal Court of Beverly Hills Judicial District. Magistrate grants motion to quash search warrant on its face, and dismisses the criminal action against

respondent after People represent they would be unable to proceed.

April 19 People file notice of motion and motion to reinstate the felony complaint, pursuant to California Penal Code Section 871.5, in the Superior Court of the State of California, County of Los Angeles.

May 2 People file memorandum of points and authorities in opposition to quashing search warrant and in support of reinstatement of the complaint under Penal Code Section 871.5

May 15 Respondent files response to People's memorandum of points and authorities.

May 16 Hearing in Superior Court for Los Angeles County, at the conclusion of which the People's

motion to reinstate the complaint is granted. Respondent waives his right to a preliminary hearing. It is stipulated that respondent be bound over to Superior Court and that the information be deemed filed that date with the same charges as on the complaint. Respondent is arraigned and pleads not guilty, and trial date is set.

May 24 Respondent files notice of motion, motion to suppress evidence under California Penal Code Section 1538.5, and motion to quash search warrant.

June 6 Suppression hearing in Superior Court for Los Angeles County. Suppression motion is granted and the criminal action against

respondent is dismissed after People represent they are unable to proceed.

July 26 — People file notice of appeal from order of June 6, 1986 suppressing evidence and dismissing the action.

Sep 20 — Record on appeal received by Court of Appeal.

Dec 17 — Appellant's opening brief filed by People in the Court of Appeal of the State of California Second Appellate District, Division Seven.

1985

May 3 — Respondent's reply brief filed.

July 1 — Respondent's supplemental memorandum of points and authorities filed.

July 16 People's response to respondent's supplemental memorandum of points and authorities filed.

Sep 5 Argument waived and submitted before the Court of Appeal.

Dec 13 Opinion and judgment of Court of Appeal filed.

Dec 19 Order modifying opinion filed by Court of Appeal.

Dec 26 Respondent's petition for rehearing filed.

Dec 30 People's petition for rehearing or modification of opinion filed.

1986

Jan 7 Petitions for rehearing denied by Court of Appeal.

Jan 22 People's petition for review filed in the California Supreme Court.

Jan 22	Respondent's petition for review filed in the California Supreme Court.
Mar 13	California Supreme Court denies petitions for review.
Mar 19	Application for stay of issuance of remittitur and request for immediate stay filed by petitioner in Court of Appeal.
Mar 20	Application for stay of issuance of remittitur is granted by the Court of Appeal.
May 6	Petition for writ of certiorari filed in the Supreme Court of the United States.
Oct 14	Certiorari granted.

Search Warrant No.

STATE OF CALIFORNIA [Receipt

COUNTY OF LOS ANGELES stamp

SEARCH WARRANT omitted]

PEOPLE OF THE STATE OF CALIFORNIA

to any sheriff, policeman or peace officer in the County of Los Angeles:

PROOF, by affidavit, having been made before me by

RAY E. SHORB, #20653 that there is
(name of affiant)
probable cause to believe that the property described herein may be found at the locations set forth herein and that it is seizable pursuant to Penal Code Section 1524 as indicated below of "x"(s) in that it:

____ was stolen or embezzled

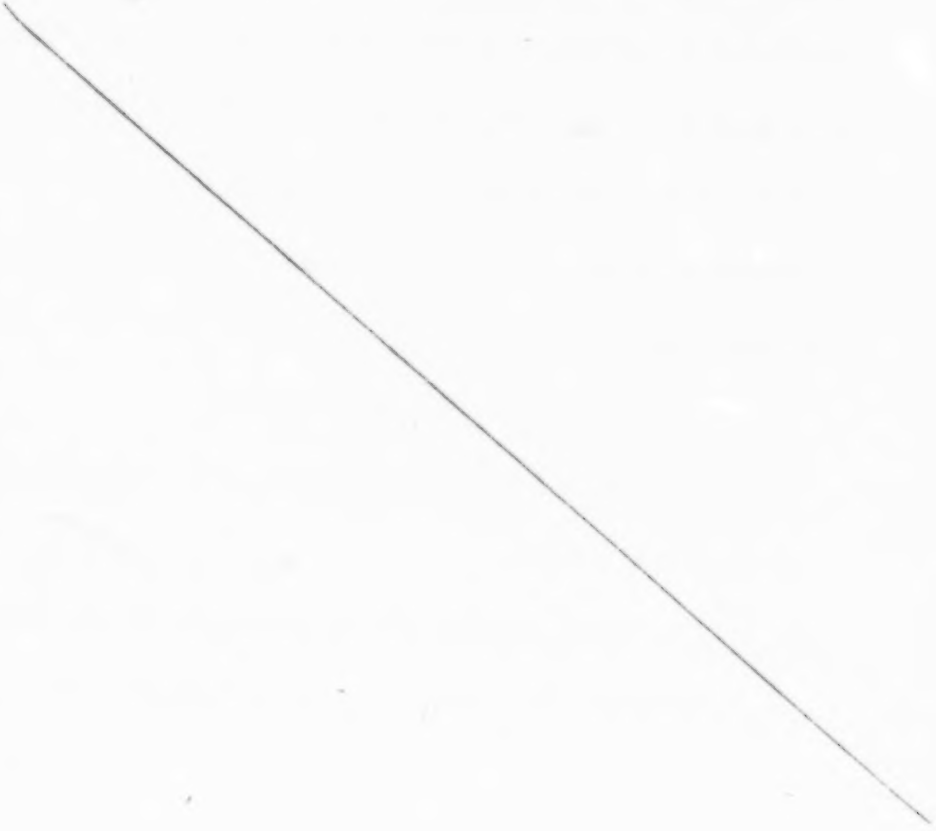
__x__ was used as the means of committing a felony

__x__ is possessed by a person with the intent to use it as a means of

committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing discovery

__x__ is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

you are therefore COMMANDED TO SEARCH



LOCATION TO BE SEARCHED

1120 North Flores Street, Apartment #8, West Hollywood, California. The premises at 1120 North Flores Street, apartment #8, West Hollywood, California, in the County of Los Angeles is described as a two story multi-unit apartment building tan stucco wtih brown wood trim. There are red brick steps leading up to the lobby area and a driveway leading to a subterranean garage. The numerals "1120" are white and located over the driveway (posted on the apartment building). Apartment number 8 is located on the second floor northwest end of the building. The numeral "8" is posted on the front (only) door of the location. Included are any storage rooms or compartments assigned to apartment number 8.

for the following property: In the County of Los Angeles, there is now being concealed therein certain property, namely bookmaking paraphernalia including, but not limited to, football cards, football stubs, owe sheets, owe markers, pay and owe sheets, pat sheets, pay markers, copies of sporting publications copies of National Daily Reporters, ledger books, disposable papers, sponges, time pieces, pencils, radios, pens, two-way communicaton systems, adding machines, adding machine tapes, telephones, record-ations of bet and bettors, telephone number and address books, printing or duplicator machine, articles of personal property tending to establish the identity of persons in control of the locations where bookmaking paraphernalia is found, consisting in part and including, but not limited to, utility company receipts,

diaries, telephone directories, rent documents or other papers bearing names thereon. Also, searching officers request authorization to answer the telephone, converse with callers who appear to be calling in regard to bookmaking, and record the conversation without revealing their true identity.

and to SEIZE it if found and bring it forthwith before me, or this court, at the courthouse of this court.

GIVEN under my hand and dated this 17th day of January, 1984 at 3:45 p.m.

/s/ Nancy Brown

Signature of Magistrate

Judge of the Municipal Court Los Angeles Judicial District

[inapplicable matter omitted]

Search Warrant No.

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

AFFIDAVIT FOR SEARCH WARRANT

RAY E. SHORB, #20653 , being sworn, says
(name of affiant)
that on the basis of the information contained within this affidavit, he has probable cause to believe and does believe that the property described below is seizable pursuant to Penal Code Section 1524 in that it: (CHECK APPROPRIATE BOX OR BOXES)

____ was stolen or embezzled

__x__ was used as the means of committing a felony

__x__ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may

have delivered it for the purpose of concealing it or preventing its discovery

__x__ is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

and that he has probable cause to believe and does believe that the described property is now located at and will be found at the locations set forth below and thus requests the issuance of a WARRANT TO SEARCH

LOCATION TO BE SEARCHED

1120 North Flores Street, Apartment #8, West Hollywood, California. The premises at 1120 North Flores Street, apartment #8, West Hollywood, California, in the County of Los Angeles is described as a two story multi-unit apartment building tan stucco wtih brown wood trim. There are red brick steps leading up to the lobby area and a driveway leading to a subterranean garage. The numerals "1120" are white and located over the driveway (posted on the apartment building). Apartment number 8 is located on the second floor northwest end of the building. The numeral "8" is posted on the front (only) door of the location. Included are any storage rooms or compartments assigned to apartment number 8.

for the following property: In the County of Los Angeles, there is now being concealed therein certain property, namely bookmaking paraphernalia incuding, but not limited to, football cards, football stubs, owe sheets, owe markers, pay and owe sheets, pat sheets, pay markers, copies of sporting publications, copies of National Daily Reporters, ledger books, disposable papers, sponges, time pieces, pencils, radios, pens, two-way communication systems, adding machines, adding machine tapes, telephones, recordations of bet and bettors, telephone number and address books, printing or duplicator machine, articles of personal property

tending to establish the identity of persons in control of the location where bookmaking paraphernalia is found, consisting in part and including, but not limited to, utility company receipts, diaries, telephone directories, rent documents or other papers bearing names thereon. Also, searching officers request authorization to answer the telephone, converse with callers who appear to be calling in regard to bookmaking, and record the conversation without revealing their true identity.

Your affiant says that the facts in support of the issuance of the search warrant are contained in the attached STATEMENT OF PROBABLE CAUSE which is incorporated as if fully set forth herein. Wherefore, your affiant prays that a

search warrant be issued for the seizure of said property or any part thereof, at any time of the day, good cause therefore having been shown.

/s/ Roy E. Shorb

Signature of Affiant

Subscribed and sworn to before me
this 17th day of January, 1984

3 45 p.

/s/ Nancy Brown

Signature of Magistrate

Judge of the Municipal Court Los Angeles Judicial District

[inapplicable matter omitted]

AFFIANT: RAY E. SHORB, #20653

Your affiant is currently assigned to Hollywood Area Vice investigating book-making activity within the Hollywood Area.

On December 3, 1983, at approximately 1330 hours, your affiant was contacted by a citizen informant who stated that Pete Rooney at telephone number 213-656-8430 was accepting wagers on professional football events over the telephone or on an answer machine and is in the location between 1600 hours and 1800 hours.

On December 7, 1983, at approximately 1300 hours, your affiant was able to confirm through Departmental sources that telephone number 213-656-8430 and utilities were listed to 1120 North Flores Street, apartment #8, West Hollywood, with the subscriber as Peter Ryan. On

December 13, 1983, at approximately 1730 hours, your affiant completed a record check on Peter Rooney. The check revealed that Peter Rooney had one prior bookmaking arrest on September 11, 1978 for 337a P.C., Bookmaking, booking number 4950542. The location of arrest was 1120 North Flores Street, apartment #8, West Hollywood. Your affiant through Departmental sources obtained a booking photograph to verify that the person under surveillance was Peter Rooney. On December 15, 1983, at approximately 0230 hours, your affiant and partner Officer Les Wyeth, #17223, drove to 1120 North Flores Street, West Hollywood and walked down the driveway to the apartment trash bin, which is a metal bin approximately 8 feet long by 4 feet wide by 5 feet high and is located in the

subterranean garage at the southeast corner of the apartment building. Your affiant noticed that there was trash spilling out of the trash bin onto the ground. Your affiant and partner Officer Les Wyeth, #17223 searched the trash bin and noticed that there was trash from numerous different apartments co-mingled inside. As your affiant and partner Officer Les Wyeth, #17223, reached the bottom half of the trash bin, your affiant located a brown paper shopping bag with mail addressed to Pete Rooney, 1120 North Flores, #8, Los Angeles. Your affiant removed the bag of trash from the trash bin and recovered letters and a magazine addressed to Pete Rooney, 1120 North Flores, #8, Los Angeles. Also recovered were pieces of paper with sports wagers, pays and owes, and a tally

sheet of wagers on different professional football teams (evidence booked on DR#83-9910022). Your affiant did not observe any mail or papers addressed to Peter Ryan. On December 16, 1983, at approximately 1600 hours, your affiant went to 1120 North Flores Street, apartment #8, West Hollywood and walked by apartment #8. Your affiant observed the curtains open, the apartment to be dark and no movement inside.

On December 16, 1983, at approximately 1615 hours, your affiant and partner Officer Les Wyeth, #17223 placed 1120 North Flores Street, apartment #8, West Hollywood, under surveillance and observed a male caucasian identified as Peter Rooney (from the booking photograph examined by your affiant) drive into the subterranean garage at 1120 North Flores Street, West Hollywood,

exit vehicle, license number 320ZFU and enter apartment #8. It should be noted that December 16, 1983 was a Friday and that there were numerous professional football games being played over the weekend of December 16, 17 and 18, 1983. Your affiant observed apartment #8 for approximately one hour and did not observe anyone else enter or leave.

On December 16, 1983, at approximately 1715 hours, your affiant dialed telephone number 213-656-8430. The telephone rang one time and was answered by an unknown male voice who stated, "hello". Your affiant terminated the telephone call. It should be noted that on December 16, 1983 at 1800 hours, there was a professional football game being played between the New York Jets and Miami Dolphins. It is common knowledge

that wagers are placed within the last hou prior to the start of the game to get the latest line*. It is common knowledge in the bookmaking world that the above actions are consistent with a sports bookmaking operation.

Between December 30, 1983 and January 6, 1984, your affiant dialed telephone number 213-656-8430 and overheard a telephone conversation between a citizen informant and an unknown male. The unknown male answered the telephone on one ring and the citizen informant asked the unknown male, "What's the latest line?" The unknown male returned wtih the latest line on the professional football team games to be played. It is common knowledge in the bookmaking world that the above actions

*Line: Point spread.

are consistent with a sports bookmaking operating.

Your affiant requests the identity of the citizen informant to be kept confidential because your affiant believes that the disclosure of the citizen informants identity will destroy or impair their future usefulness to law enforcement engaged in investigating criminal activity and would subject the informant to great bodily injury or death from those they have informed upon and their associates.

Your affiant has been a police officer for ten years. During this time your affiant has been assigned to Hollywood Vice for the past eight months. Your affiant is presently investigating bookmaking activity within the Hollywood Area and has conducted seven bookmaking

invesitgations culminating in three arrests.

Your affiant's partner Officer Les Wyeth, #17223 has been a police officer for twelve years. During this time your affiant's partner Officer Les Wyeth, #17223 has been assigned to Hollywood Area Vice for the past twelve months. Your affiant's partner is presently investigating bookmaking activity within the Hollywood Area and has conducted an excess of thirty book-making investigations culminating in seventeen arrests.

It is your affiant and partner Officer Les Wyeth's, #17223, opinion that 1120 North Flores Street, apartment #8, West Hollywood, in the County of Los Angeles is operating in the fashion on [sic!] a

**straight-in-back office accepting wagers on professional football games. It is your affiant and partner Officer Les Wyeth's, #17223, opinion that Peter Rooney is the head of the bookmaking operation at that location. It is your affiant and partner Officer Les Wyeth's, #17223, experience that bookmaking activities are

---

**Straight-in-back office: Bookmaking operation, operated as a back office while accepting individual bets from bettors who phone directly into the back office. Back office is a bookmaking location where wagers are permanently kept until settled.

almost always conducted over the telephone. Persons place wagers and request payoffs. Thus, your affiant and partner Officer Les Wyeth, #17223 requests this warrant to contain an authorizaton for officers to answer the telephone within the premises during the search in order to obtain evidence such as wagers being placed and payoffs being requested. It is your affiant and partner Officer Les Wyeth's, #17223, opinion that callers will attempt to place wagers and request payoffs in the telephone coversatons.

2/1/84 - mail

IN THE MUNICIPAL COURT OF BEVERLY HILLS

JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. PETER ROONEY, Defendant.

No. A088619

Complaint Felony

[Filing Stamp Omitted]

Personally appeared before me this 30th day of January, 1984 R. Shorb, LAPD Hwd Vice of the County of Los Angeles who, being first duly shown an oath, upon information and belief complains and says:

That on or about the 22nd day of January, 1984, at and in the County of Los Angeles, State of California, the crime of VIOLATION OF SECTION 337a, SUBDIVISION 1, Penal Code of California, a felony, was committed by

PETER ROONEY

who, at the time and place last aforesaid, did willfully, unlawfully and feloniously engage in poolselling and bookmaking upon the result and purported result of a trial, and purported trial, and contest and purported contest, of skill, speed and power of endurance, to wit, football.

COUNT II

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charge set forth in count one hereof,

complainant further complains and says:

That on or about the 22nd day of January, 1984, at and in the County of Los Angeles, State of California, the crime of VIOLATION OF SECTION 337a, SUBDIVISION 2, Penal Code of California, a felony, was committed by

PETER ROONEY

who, at the time and place last aforesaid, did willfully, unlawfully and feloniously, for gain, hire, reward, gratuitously and otherwise, keep and occupy apartment located at 1120 N. Flores, #8, W. Hollywwod with a book and books, paper and papers, apparatus, device and paraphernalia, for the purpose of recording and registering a bet and bets, and purported bet and bets, and wager and wagers, and purported wager and wagers, and of selling pools and

purported pools, upon the result and purported result of trial and purported trial, and contest and purported contest, of skill, speed and power of endurance, to wit, football.

COUNT III

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charges set forth in all preceding counts hereof, complainant further complains and says:

That on or about the 22nd day of January, 1984, at and in the County of Los Angeles, State of California, the Crime of VIOLATION OF SECTION 337a, SUBDIVISION 4, Penal Code of California, a felony, was committed by PETER ROONEY who, at the time

and place last aforesaid, did willfully, unlawfully and feloniously, for gain, hire, reward, gratuitously and otherwise, record and register a bet and bets, and a wager and wagers, upon the result and purported result of a trial and purported trial, and contest and purported contest of skill, speed and power of endurance, to wit, football.

COUNT IV

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charges set forth in all preceding counts hereof, complainant further complains and says:

That on or about the 22nd day of January, 1984, at and in the County of Los Angeles, State of California, the crime of

VIOLATION OF SECTION 337a, SUBDIVISION 5, Penal Code of California, a felony, was committed by

PETER ROONEY

who, at the time and place last aforesaid, did willfully, unlawfully, feloniously and knowingly, being the owner, lessee and occupant of the premises located at 1120 N. Flores, #8, W. Hollywood permit Peter Rooney to occupy said building and room with a book and books, paper and papers, apparatus, device and paraphernalia for the purpose of recording and registering a bet and bets, and purported bet and bets, and wager and wagers, and purported wager and wagers, and of selling pools and purported pools, upon the result and purported result of trial and purported trial, and contest and purported contest, of skill,

speed and power of endurance, to wit, football.

COUNT V

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charges set forth in all preceding counts hereof, complainant further complains and says:

That on or about the 22nd day of January, 1984, at and in the County of Los Angeles, State of California, the crime of VIOLATION OF SECTION 337a(6), Penal Code of California, a felony, was committed by PETER ROONEY who did willfully and unlawfully lay, make, offer, and accept a bet and bets, and wager and wagers, upon the result and purported result, of a trial, purported trial, contest, and

purported contest, of skill, speed, and power of endurance, to wit, football.

/s/ Ray Shorb by Les Wyeth

R. Shorb

Subscribed and sworn to before me on January 30, 1984

/s/ [Signature Illegible]

Judge of the above entitled Court

Issued by

ROBERT H. PHILIBOISAN

District Attorney

By

/s/ R. Schuit

ROBERT SCHUIT/rlws Deputy

Bail Recommended

$2,500.00

WITNESSES

LAPS HWD VICE

BEVERLY HILLS AREA OFFICE

Deft: In Custody

CII No. (or other)

CII: 01737874

Bkg: 7437374

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES — DEPT. WEST A

Date MAY 16, 1984

HONORABLE:	
MARIO L. CLINCO	L. EDISON
JUDGE	Deputy Clerk
B. GOVER	M. HOUSE
Deputy Sheriff	Reporter

A 088619 (Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA	Counsel for People: DEPUTY DISTRICT ATTORNEY J PERRUZZA
VS	
01 ROONEY, PETER	Counsel for Defendant: A LEWIS

(No file available)

NATURE OF PROCEEDINGS PEOPLE'S MOTION TO REINSTATE COMPLAINT UNDER SECTION 871.5 PENAL CODE

People's motion to reinstate the complaint is called for hearing.

Motion is argued and granted.

Defendant waives his right to a preliminary hearing. Defendant furtehr waives his right to confrontation of witness for the purpose of cross-examination.

It is stipulated by and between both sides that the defendant can be bound over to Superior Court. It is further stipulated that the information be deemed filed this date with the same charges as on the complaint.

Defendant is arraigned and pleads not guilty.

Trial is set for June 19, 1984, at 9:00 AM in Department H, possible disposition.

Defendant's motion to be released on his own recognizance is granted. No reason given.

Agreement to appear-Release on own recognizance signed and filed this date.

O.R.

MINUTES ENTERED

DEPT WE A MAY 17 1984

COUNTY CLERK

MINUTE ORDER

ARTHUR LEWIS
Attorney at Law
205 South Broadway, Suite 802
Los Angeles, California 90012
(213) 624-4901
Attorney for Defendant,
PETER ROONEY

[filing stamp omitted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. PETER ROONEY, Defendant.	Case No. A 088619 NOTICE OF MOTION AND MOTION TO SUPPRESS EVIDENCE UNDER SECTIO 1538.5 OF THE PENAL CODE; (MOTION TO QUAS SEARCH WARRANT)

TO: THE LOS ANGELES DISTRICT ATTORNEY, ROBERT PHILIBOSIAN AND HIS DEPUTIES:

YOU AND EACH OF YOU PLEASE TAKE NOTICE that on June 6, 1984 at 9:00 a.m. or as soon thereafter as the matter may be heard in Department H of the above-entitled court, defendant, Peter Rooney will move for an Order to suppress evidence all tangible or intangible things seized, including but not limited to observations and conversations.

Said motion will be based upon the recent ruling of the California Supreme Court in People v. Chapman Crim. 22776 the other authorities heretofore cited by

defendant in the court below and which points and authorities are contained in the file herein.

DATED: May 22, 1984

/s/ Arthur Lewis

ARTHUR LEWIS

Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

It is respectfully submitted that defendant Peter Rooney had a reasonable expectation of privacy in the telephone registered to his location at 1120 North Street, Apartment #8, West Hollywood, California (note declaration of Peter Rooney that he was a subscriber to that telephone under the name of Peter Ryan and that said telephone was non published).

It is submitted that the affidavit in support of the search warrant clearly reflects that the officers (thru departmental facilities) determined that the telephone number given to them by their informant was checked thru departmental facilities and determined to be

registered to Peter Ryan at said address. Absent the securing by the police of the address to which said number was registered, the subsequent investigation would not, could not have been made.

It is respectfully submitted that the securing by the officers of the address to which the telephone was listed "thru departmental sources" was by way of a police request from the Telephone Company for said information. That at the time of the securing of this search warrant this was the standard police practice in matters of this kind. Should there be any question concerning this matter, counsel would then request permission to take testimony thereon.

This is a matter of common knowledge which the District Attorney's office

can, should the same be required, learn by inquiring of their affiant.

It is also respectfully submitted that the trash can search was in violation of Edwards and Krivda, 5 Cal.3d 357 (1971).

This courts review is respectfully requested.

DATED: May 22, 1984

Respectfully sbmitted,

/s/ Arthur Lewis

ARTHUR LEWIS

Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. WE H

Date 6-6-84

HONORABLE:

D. FITTS	M. WHITE
JUDGE	Deputy Clerk
J. JONES	L. ANASTASIOU
Deputy Sheriff	Reporter

A088619 (parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA	Counsel for People: DEPUTY DISTRICT ATTORN
ROONEY, PETER	T. MILLER
337a.1 lct	Counsel for Defendant:
337a.2 lct	A . LEWIS

NATURE OF PROCEEDINGS 1538 OR

* * * * *

---

37 /x/ MOTION PURSUANT TO SECTION 1538.5 PENAL CODE CALLED FOR HEARING

* * * * *

44 /x/ Defense 1385 Penal Code Motion granted. People state they are unable to proceed. Trial date of 6-19-84 is advanced and vacated.

* * * * *

46 /x/ MOTION PURSUANT TO SECTION 1538.5 PENAL CODE GRANTED.

* * * * *

---

60 /x/ FURTHER ORDER AS FOLLOWS: Case dismissed as indicated box #44.

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* * * * *

* * * * *

* * * * * /x/ O R DISCHARGED * * * * *

MINUTES ENTERED

6-6-84

COUNTY CLERK

MINUTE ORDER

REPORTER'S TRANSCRIPT OF PROCEEDINGS,

SUPERIOR COURT OF LOS ANGELES COUNTY

JUNE 6, 1984; 10:50 AM

DEPARTMENT WEST "H"

HON. DAVID N. FITTS, JUDGE

--000--

(THE DEFENDANT ROONEY BEING PRESENT IN COURT AND REPRESENTED BY COUNSEL, ARTHUR LEWIS, ESQ.; THE PEOPLE OF THE STATE OF CALIFORNIA BEING REPRESENTED BY THOMAS MILLER, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY.)

(LORI SUSANNE ANASTASIOU, OFFICIAL REPORTER.

THE COURT: PEOPLE VERSUS PETER ROONEY. DEFENDANT IS PRESENT WITH COUNSEL.

THE MATTER PENDING, MOTION TO SUPPRESS EVIDENCE PURSUANT TO SECTION 1538.5. AT THIS POINT TO CLASSIFY THE ISSUE, IS DIRECTED AT THE SUFFICIENCY OF THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT AND CHALLENGES THAT AFFIDAVIT ON ITS FACE BY REASON OF THE ALLEGATION THAT THE POLICE DEPARTMENT SECURED THE ADDRESS OF AN UNLISTED PHONE NUMBER FROM THE PHONE COMPANY WITHOUT FIRST OBTAINING A WARRANT.

AND THE ARGUMENT WOULD BE THAT WITHOUT THIS INFORMATION, THE INVESTIGATION WOULD HAVE RENDERED THE WARRANT INSUFFICIENT ON ITS FACE.

MR. LEWIS: THAT'S CORRECT, YOUR HONOR, WITH ONE EXCEPTION.

I SUPPOSE, WHAT WE'VE DONE, WE'VE ATTACHED A DECLARATION OF MR. ROONEY INDICATING THAT HE WAS A SUBSCRIBER TO THAT TELEPHONE; THAT HE HAD REQUESTED IT TO BE NON-PUBLISHED OR UNLISTED; THAT HE HAD NOT AUTHORIZED THE [1] TELEPHONE COMPANY TO GIVE OUT ANY INFORMATION CONCERNING THAT NUMBER AND/OR ANYTHING ELSE THAT MIGHT BE REQUIRED IN CONNECTION WITH THE FACT THAT HE IS A SUBSCRIBER TO THE NUMBER AND IT WAS UNLISTED.

I MIGHT ALSO POINT OUT THAT IF -- AND BASED ON SOME CONVERSATION I JUST HAD WITH THE D.A., HE IS NOW INDICATING TO ME FOR THE FIRST TIME IT'S POSSIBLE THAT THEY HAD MR. ROONEY'S ADDRESS FROM THE

INFORMANT.

IT IS NOT CONTAINED WITHIN THE AFFIDAVIT, SO TO THE EXTENT THAT THEY WERE GOING TO DO THAT, I SUPPOSE THAT WOULD REQUIRE SOME ADDITIONAL TESTIMONY IN THE NATURE OF A CONTROVERTING OR --

THE COURT: ALL I WAS TRYING TO DO WAS TO PUT THE ISSUE AS SIMPLY AS POSSIBLE.

MR. LEWIS: YES, I AGREE WITH THE COURT'S STATEMENT OF THE ISSUE.

THE COURT: VERY WELL.

NOW, TO PUT THE POEPLE'S POSITION IN A NUTSHELL.

THEY WOULD UNDOUBTEDLY BE URGING INEVITABLE DISCOVERY, AND THAT'S DISCLOSED BY CERTAIN INFORMATION ALSO CONTAINED IN THE WARRANT.

THEY HAD THE NAME OF PETER ROONEY.

THEY HAD AN ADDRESS IN THEIR RECORDS BECAUSE OF A PREVIOUS ARREST WHICH HAS BEEN MADE AT THE PRECISE LOCATION REQUESTED.

THE APPLICAION TO THE PHONE COMPANY, OF COURSE, DIDN'T EVEN GIVE THE NAME OF PETER ROONEY, IT GAVE A DIFFERENT NAME. [2]

AND THE PEOPLE WOULD URGE THAT THEY HAD ALREADY HAD THAT NAME.

SURVEILLANCE CONNECTED TO KNOWN PEOPLE, PETER ROONEY, APARTMENT 8. THEY SAY IN THE AFFIDAVIT THAT THEY PROCEEDED TO THAT ROOM. THEN OF COURSE THE SUBSIDIARY ISSUE, I SUPPOSE, ABOUT THE SEARCH OF THE COMMON TRASH CAN.

I THINK PERHAPS THE MOST RECENT EXPRESSION IN THAT AREA IS ONE OF MY

CASES. AN AFFIRMATIVE, CERTIFIED PUBLICATION, VERY RARE. I SHOULD REMEMBER THE NAME, IT'S A CATCAPER.

THE CLERK: SADOWSKI.

THE COURT: THAT'S RIGHT. PEOPLE VERSUS SADOWSKI; IT'S CRIM. 43545.

ANYWAY, IT'S OUT.

MR. MILLER: WHAT DOES THAT STATE?

THE COURT: NO EXPECTATION OF PRIVACY, THE TRASH CAN RECEPTABLE IS COMMON TO ALL MEMBERS OF THE APARTMENT BUILDING, TO PARAPHRASE.

ANYWAY, I REGARD THAT AS THE SAME.

MR. MILLER: THE PEOPLE'S POSITION IS AS STATED. THERE IS NOTHING IN THIS WARRANT OR THE AFFIDAVIT

WHICH INDICATES THAT THE PHONE NUMBER WAS UNLISTED.

IT MAY OR MAY NOT HAVE BEEN. I KNOW THAT MR. ROONEY IS READY TO TESTIFY TO THAT. THE AFFIDAVIT IS SIMPLY EVIDENCE, BUT YOU CAN'T PROTECT THE WARRANT ON THE FACE WHEN IT DOESN'T STATE THAT.

BUT THE POSITION IS THAT -- [3]

THE COURT: THAT'S A TECHNICALITY REALLY. YOU WOULDN'T HAVE TO GO TO THE PHONE COMPANY TO FIND OUT WHERE THE SUBSCRIBER WAS OR WHO HE WAS. ALL YOU HAD TO DO WAS PICK IT UP FROM THE TELEPHONE BOOK.

MR. MILLER: IF THEY HAD ONE FOR THAT AREA.

IT PROBABLY WAS UNLISTED, BUT IT'S NOT IN THE WARRANT.

THE COURT: I KNOW THAT.

MR. MILLER: THE MAIN POINT IS THAT THEY HAD THIS INFORMATION FROM OTHER SOURCES.

THE COURT: WHAT'S YOUR RESPONSE TO THAT?

MR. LEWIS: WELL, YOUR HONOR, WHILE THEY HAD THIS NUMBER FROM AN OLD ARREST, THAT WAS A 1978 ARREST. THEY DON'T KNOW THAT THIS --

THE COURT: I DON'T BELIEVE THAT THEY HAD HIS NUMBER FROM THAT ARREST. I'M ASSUMING THAT HE WAS USING ANOTHER NUMBER. THEY HAD THE CURRENT NUMBER BECAUSE THEY GOT THAT FROM THE INFORMANT, RIGHT?

THE AFFIDAVIT DISCLOSES THAT THEY RAN THAT NUMBER THROUGH

DEPARTMENTAL SOURCES, AND YOU KNOW WHAT THAT MEANS.

MR. LEWIS: THAT'S WHAT DIRECTS THEM TO THIS LOCATION.

THE COURT: YES.

THEN IN THE NEXT SENTENCE -- THEY DIDN'T GET THIS DEFENDANT'S NAME, BUT IN THE NEXT SENTENCE THEY SAID THEY ALSO HAD RUN MR. ROONEY'S NAME THROUGH DEPARTMENTAL SOURCES, AND THAT'S ALL RIGHT.

AND THEY FOUND THIS PARTICULAR ADDRESS. [4]

MR. LEWIS: THERE IS NO PROBABLE CAUSE ABSENT THE TRASH CANS -- THE OBSERVATIONS DIDN'T REVEAL ANYTHING; ALL THEY DID WAS SEE HIM GO INTO HIS HOUSE ON A PARTICULAR DAY; THEY ONLY MADE A SURVEILLANCE ON ONE DAY; AND THEY

ONLY SAW HIM GO IN.

THEY MADE A TELEPHONE CALL ON THAT NUMBER AND NOW THAT THEY KNOW HIS NUMBER, GOT HIS LOCATION, THEY HAVE THIS ONE CONVERSATION. SO THAT HAS TO GO OUT TOO.

YOU'RE REALLY LEFT WITH NOTHING MORE THAN GOING TO THE LOCATION AND SEEING --

THE COURT: WELL, NO, JUST A SECOND. THEY HAD THE NUMBER. MAKING A PHONE CALL TO THAT NUMBER DIDN'T REQUIRE KNOWING ANYTHING MORE THAN THE TELEPHONE NUMBER

MR. LEWIS: I THINK WITHOUT KNOWING WHERE THE TELEPHONE GOES, THE INFORMATION FROM THAT REALLY DOESN'T

HELP THEM IN THEIR INVESTIGATION.

THE COURT: YES, BUT IF THEY MAINTAIN THE SURVEILLANCE, THE AFFIDAVIT STATES THEY HAD A BOOKING PHOTO OF MR. ROONEY AND HE WAS APPARENTLY GOING INTO APARTMENT #8.

MR. LEWIS: I THINK IT'S REALLY CLEAR THAT -- YOU KNOW, ABSENT THE CONNECTION WITH THE TELEPHONE NUMBER THAT THEY GOT, THE ADDRESS TO WHICH IT GOES AND THE NAME, THE ONE OBSERVATION AT THAT LOCATION DOESN'T REALLY REFLECT ANY BOOKMAKING ACTIVITY.

THEY SEE MR. ROONEY TO GO INTO THE HOUSE, OR THE APARTMENT. THAT'S ALL THEY REALLY DID, YOUR HONOR, OTHER THAN CHECK THEIR RECORDS. AND MAKE THAT ONE TELEPHONE [5] CALL SOMEWHERE BETWEEN

DECEMBER 30TH AND JANUARY 6TH.

THE COURT: THE TOP OF PAGE A-5, THE FIRST COMPLETE SENTENCE: "AS YOUR AFFIANT AND PARTNER OFFICER LES WYETH, #17223, REACHED THE BOTTOM HALF OF THE TRASH BIN, YOUR AFFIANT LOCATED A BROWN PAPER SHOPPING BAG WITH MAIL ADDRESSED TO PETE ROONEY, 1120 NORTH FLORES, APARTMENT #8, LOS ANGELES."

MR. LEWIS: WE'RE TALKING ABOUT GOING THROUGH THE TRASH. I THINK CLEARLY THAT GOING THROUGH THE TRASH WAS THE VIOLATION OF THE RIGHT OF PRIVACY. THE REASONABLE EXPECTATION OF PRIVACY.

THIS IS WHAT WE ADDRESSED MUCH OF THIS THING TO.

THE COURT: THAT'S WHY I CITED PEOPLE VERSUS SADOWSKI.

MR. LEWIS: AND YOUR HONOR IS INDICATING THAT SADOWSKI STANDS FOR THE PROPOSITION THAT THEY MAY GO THROUGH THE TRASH?

THE COURT: YES, RIGHT, NO EXPECTATION.

MR. LEWIS: IN SPITE OF KRIVDA AND -- I'M NOT FAMILIAR WITH SADOWSKI, YOUR HONOR, BUT I AM WITH EDWARDS AND KRIVDA.

THE COURT: PAGE 13 OF THE -- UNDER ROMAN NUMERAL 111, "THE WARRANT FOR SEARCH OF TRASH BIN WAS PROPER."

MR. LEWIS: IS THAT ON THE GROUND OF NO REASONABLE EXPECTATION OF PRIVACY?

MR. MILLER: COMMMUNAL TRASH BIN. THAT'S THE DIFFERENCE IN

KRIVDA.

THE COURT: WELL, I GUESS THIS IS WHAT I REMEMBER, [6] FOOTNOTE, THEY CONCLUDED THAT THE ISSUE OF THE ISSUE OF THE SEARCH OF THE TRASH BIN WAS NOT BEFORE THEM ON APPEAL. IT HAD BEEN PRESERVED ON THE RECORD BELOW.

BOTTOM OF PAGE 15, HOWEVER, FOOTNOTE 1:

"APPELLANT HAS URGED THAT THE SEARCH OF THE TRASH BIN IN THE CASE AT BAR WAS PROSCRIBED BY PEOPLE V. KRIVDA (1971) 5 CAL. 3D 357. WERE WE TO CONSIDER THIS POINT, WE COULD WITH-OUT DIFFICULTY CONCLUDE THAT TRASH WOULD LOSE

ITS 'IDENTITY" AND THE
DEPOSITOR'S REASONABLE
EXPECTATION OF PRIVACY
UNDER KRIVDA WHEN DEPOSITED
IN A CONTAINER USED BY 72
OTHER APARTMENT DWELLERS
AND TO RANDOM PASSERSBY,
SEE PEOPLE VS. STEWART
34 CAL. APP 3D 695."

MR. MILLER: 34 CAL. APP 3D?

MR. LEWIS: YOUR HONOR, IF I COULD ADDRESS MYSELF TO STEWART.

WE MADE A COMPLETE STUDY AND ANALYSIS OF THE TRASH CAN CASES. AND STEWART IS THE ONLY CASE THAT COMES CLOSE TO JUSTIFYING THE SEARCH OF THE COMMUNAL TRASH BIN.

WE'D HAVE TO CONCEDE THAT EDWARDS AND KRIVDA SAY THAT THERE

IS A REASONABLE EXPECTATION OF PRIVACY IN A HOUSEHOLDER'S TRASH.

EDWARDS WAS ONE WHERE IT WAS ON HIS BACK PORCH AND THE COURT SAID IT ISN'T BECAUSE THEY HAD TO TRESPASS TO DO IT.

KRIVDA CAME ALONG AND SAID, "LOOK, IT ISN'T UNTIL THAT TRASH HAS BEEN REMOVED AND BEEN COMINGLED WITH A LARGE CONGLOMERATION OF TRASH ELSEWHERE AND HAS LOST ITS [7] IDENTITY, SO THAT IT CAN'T BE READ."

IT'S WHEN YOU READ THAT LANGUAGE FROM KRIVDA THAT YOU RECOGNIZE WHAT THEY WERE TALKING ABOUT.

NOW, IN STEWART, YOU HAD A TRASH CAN OR A COMMUNAL TRASH CAN; IT WAS AN APRTMENT [SIC!] BUILDING. AND THE ARGUMENT WAS MADE THAT YOU DONT'T HAVE THE SAME

REASONABLE EXPECTATION OF PRIVACY.

BUT THE COURT IN STEWART WENT ON TO SAY THAT IN THIS CASE THEY HAD BEEN WATCHING STEWART. HE WAS A SUSPECTED OR KNOWN BOOKMAKER. HE HAD GONE TO THIS PLACE DURING BOOKMAKING HOURS, HE WAS LEAVING RIGHT AFTER THE BOOKMAKING HOURS.

ON THIS ONE PARTICULAR DAY HE TOOK HIS TRASH. HE WENT OUT TO THE TRASH, HE LOOKED AROUND AND HE VERY CAREFULLY HID THE TRASH UNDER THE WHATEVER. AND THEY SAID THE TRASH MAN WAS COMING. IT WAS GOING TO BE REMOVED.

THEY FOUND THAT THERE WAS AN EXIGENT CIRCUMSTANCE AND THAT THEY JUSTIFIED THE SEARCH OF THE TRASH UNDER THOSE CIRCUMSTANCES.

AND THEY SPECIFICALLY SAID IN STEWART, "WE ARE NOT PREPARED TO SAY THAT A HOUSEHOLDER IN AN APARTMENT BUILDING WITH A LARGE NUMBER OF PEOPLE, HAS A LESSER EXPECTATION OF PRIVACY."

SO STEWART NEVER REALLY RULED ON THAT, JUDGE.

AND WHAT YOU REALLY HAVE IS, YOU HAVE KRIVDA, WHICH SAYS THAT "UNTIL THE TRASH HAS BEEN REMOVED ELSEWHERE AND BE COMINGLED WITH A LARGE CONGLOMERATION SO THAT IT LOSES ITS IDENTITY TO AVOID BEING READ," THAT'S [8] THE KEY TO THE WHOLE THING; THEY DONT'T WANT THE OFFICERS READING PEOPLE'S TRASH.

WHAT THEY HAD TO DO HERE WAS TO RUMAGE ALL THE WAY THROUGH. IT SAYS "WHEN THEY REACHED THE BOTTOM HALF OF

THE TRASH BIN" -- THAT'S THE TOP OF A-5. IT'S NOT AS THOUGH THEY WALKED BY AND KIND OF SAW IT IN THERE AND MAYBE PUSHED A FEW THINGS AROUND.

SO YOU REALLY GO UP FURTHER IN THIS PARTICULAR CASE.

STEWART DOESN'T HELP THE PEOPLE AT ALL. IT TRULY DOESN'T.

YOUR HONOR'S INDICATED THAT THERE'S A REFERENCE IN YOUR HONOR'S CASE SADOWSKI, TO STEWART. BUT YOU HAVE TO READ STEWART THOROUGHLY AND CAREFULLY AND YOU FIND THAT IT DOESN'T SAY "COMMUNAL."

A LOT OF PEOPLE HAVE THOUGHT THAT COMMUNAL TRASH BINS MAY HAVE A LESSER EXPECTATION OF PRIVACY BECAUSE OF THIS KIND OF CONVERSATION. BUT WHEN YOU READ

IT, IT DOESN'T -- KRIVDA IS STILL THE LAW.

YOU HAVE THE -- YOU KNOW, I DONT'T KNOW WHAT ELSE I COULD SAY TO YOU, OTHER THAN THERE'S BEEN NO CASE THAT HAS DONE AWAY WITH EDWARDS AND KRIVDA. THERE'S BEEN NO CASE THAT HAS SAID A COMMUNAL TRASH CAN OR PEOPLE IN AN APARTMENT BUILDING HAVE A LESSER EXPECTATION OF PRIVACY, YOUR HONOR.

THE COURT: I AGREE WITH YOU THAT THE FOOTNOTE IN SADOWSKI IS DICTUM, BUT THE ISSUE IS NOT BEFORE ME.

MR. LEWIS: WE'VE HAD THESE ISSUES SO MANY TIMES. [9] I'VE HAD THEM AROUND AND I'VE NEVER HAD ONE WITH A CASE OF THIS KIND WHERE THEY'VE HAD TO GO ALL THE WAY DOWN TO THE BOTTOM OF THE TRASH.

IN KRIVDA IT SAYS WHAT IT SAYS AND THE PEOPLE ARE JUST NOT GOING TO BE PERMITTED TO DO IT. IF THEY WANT TO TAKE AN APPEAL...

OTHER THAN THAT, WE'RE LEFT WITH ONE OBSERVATION, ON DECEMBER 16TH THEY SAW HIM DRIVE INTO HIS SUBSTERRANEAN GARAGE AND ON DECEMBER 16TH THERE WERE NUMEROUS FOOTBALL GAMES BEING PLAYED.

THEY OBSERVED IT FOR AN HOUR AND DIDN'T SEE ANYBODY COME IN OR GO OUT.

THAT SHOULD DO IT. SUBMITTED.

THE COURT: EXTREMELY CLOSE ISSUE OF LAW.

I'M GOING TO GRANT THE MOTION AND LET THE PEOPLE TAKE IT UP.

MR. LEWIS: THANK YOU, YOUR HONOR.

I PRESUME WITH THIS RULING, THE PEOPLE WOULD BE UNABLE TO PROCEED.

MOTION TO DISMISS, YOUR HONOR.

MR. MILLER: TRUE.

WHAT'S THE BASIS OF THE COURT'S RULING, THE STEWART CASE, THE SEARCH OF THE TRASH CAN?

THE COURT: YES. I THINK THEY OUGHT TO GET A HOLDING ON THIS, DON'T YOU?

MR. MILLER: I WOULD THINK THAT STEWART WOULD BE THE CASE THAT WOULD CONTROL ON THIS. I DON'T BELIEVE THAT IT STANDS FOR WHAT MR. LEWIS STATES IT STANDS FOR. [10]

MR. LEWIS: HAVE YOU READ STEWART, COUNSEL? I'M NOT MISQUOTING, I HAVE QUOTES FROM STEWART RIGHT IN THE

BRIEFS, TAKEN RIGHT OUT OF THERE; IT'S NOT JUST ORAL ARGUMENT MADE JUST NOW.

THE COURT: OKAY, THAT'S IT.

(PROCEEDINGS CONCLUDED.)

* * * [11]

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE, Plaintiff and Appellant, v. PETER ROONEY, Defendant and Respondent.	No. B006936 (Super.Ct. No. A 088619)

APPEAL from a judgment of the Superior Court of Los Angeles County. D. Fitts, Judge. Reversed.

Ira Reiner, District Attorney of Los Angeles County, Donald J. Kaplan and Arnold T. Guminski, Deputy District Attorneys, for Plaintiff and Appellant.

(Court of Appeal, Second Dist., Filed December 1985, Clay Robbins, Jr., Clerk.)

Arthur Lewis, for Defendant and Respondent.

The People bring this appeal (Penal Code, § 1238, subd. (a)(7)[1] from the order dismissing the case against defendant who was charged with bookmaking (§ 337a). The dismissal was entered after the prosecution represented that it could not proceed due to the granting of defendant's motion to quash a search warrant and suppress evidence (§ 1538.5). The first issue before us is whether the warrantless search of the defendant's apartment building's trash bin constituted an unreasonable search and seizure. We conclude that it did for lack of probable cause. The second issue is

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1. Hereafter, all section references are to the Penal Code.

whether a police officer's affidavit provided probable cause for the issuance of the search warrant authorizing the search of defendant's apartment. We conclude that even excluding the items seized from the trash bin, the tip from the informant coupled with other corroborating evidence were sufficient to support the warrant. We therefore reverse and remand.

I

FACTUAL AND PROCEDURE BACKGROUND

The following evidence was before the magistrate. On December 3, 1983, an informant told the affiant, Officer Shorb, that defendant, Peter Rooney, was accepting wagers on professional football games over the telephone and with an answering machine at (213) 656-8430. Although the informant told Shorb that defendant was "in the loca-

tion between 1600 hours and 1800 hours," the informant did not tell Shorb the address of "the location."

On December 7, 1983, Shorb ascertained through the telephone company that the number given to him by the informant was registered to a Peter Ryan at 1120 North Flores Street, Apartment #8, West Hollywood. Shorb also determined that the utilities at that address were registered in the name of Peter Ryan.

On December 13, 1983, Shorb learned from defendant's arrest record that defendant had been arrested three years earlier for bookmaking activities at 1120 North Flores Street, Apartment #8, West Hollywood. Shorb obtained a booking photo of defendant from the prior arrest.

On December 15, 1983, Officers Shorb and Wyeth went to 1120 North Flores Street, West Hollywood, a 28-unit apartment building with a subterranean garage. The officers entered the garage and conducted a search of the communal trash bin, which measured approximately 8'x4'x5', and was filled to capacity. Upon reaching the bottom half of the bin, Shorb discovered a brown paper shopping bag with mail addressed to defendant, but not to Peter Ryan, at 1120 North Flores Street, Apartment #8, West Hollywood, the address obtained from the telephone company and defendant's arrest record. The bag also contained pieces of paper with "sports wagers, pays and owes, and a tally sheet of wagers on professional football teams. . . ."

While conducting a surveillance of the apartment building on December 26,

1983, Shorb saw a male caucasian, whom he recognized from the booking photograph to be defendant, drive into the subterranean garage and enter apartment #8. Shorb observed apartment #8 for approximately one hour, during which time no one entered or left. This occurred on the Friday afternoon before a weekend when numerous professional football games were to be played.

Subsequently, Shorb dialed the telephone number that was given to him by the informant and which the telephone company told him was listed to apartment #8, and overheard a telephone conversation between the informant and an unknown male. The informant asked, "'What's the latest line?,'" to which the unknown male responded with the latest point spreads on professional football games.

Both Officers Shorb and Wyeth had prior experience in bookmaking investigations and arrests, from which they formed the opinion that defendant was operating a bookmaking office at the apartment. Based on Shorb's supporting affidavit which detailed the above information, a search warrant issued authorizing a search of defendant's apartment. The record on appeal contains no details of the search, the items seized, or defendant's arrest.

Defendant moved to quash the search warrant and to exclude evidence (§ 1538.5). In granting his motion, the magistrate stated that the betting markers and paraphernalia found in the warrantless search of the trash bin were the fruits of an invalid search. The magistrate concluded that the other evidence corroborating the informant's

tip -- the telephone conversation concerning the latest line and defendant's prior arrest for bookmaking at the same address that was matched to the telephone number provided by the informant -- failed to provide probable cause to support the issuance of the search warrant.

After the superior court granted the prosecution's section 871.5 motion, defendant again moved to quash the search warrant and to suppress evidence (§ 1538.5). At the hearing on defendant's motion, the trial court ordered the search warrant quashed and the evidence suppressed on the ground that the warrantless search of the trash bin constituted an unreasonable search and seizure.

Following the prosecutor's representation that the People would not be able to proceed, the case was dismissed. The prosecution appeals from the order of dismissal.

II

DISCUSSION

The prosecution contends that the warrantless search of the trash can was a valid search under both the federal and state Constitutions, and that the search warrant was properly supported by the existence of probable cause.

A. The Warrantless Search of the Trash Bin

The issue before us is the reasonableness of defendant's expectation of privacy in a bag of trash placed in a communal trash bin located in the apartment's garage, an area accessible to the public. First, we note that the mere

fact that the trash bin was located in an area accessible to the public is not dispositive of the issue. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (Katz v. United States (1967) 389 U.S. 347, 351-352.)

With respect to the validity of trash can searches, our Supreme Court has stated that the "secondary degree of protection [that] applies to automobiles . . . also appears to apply to a trash can placed by the curb for the disposal of its contents . . . ." (People v. Dumas (1973) 9 Cal.3d 871, 882, fn. 9.) An automobile

"may be searched upon probable cause and upon a showing that 'delay would enhance the possibility the articles would be destroyed or placed beyond the reach of the officers. [Fn. omitted.]'" (People v. Parker (1974) 44 Cal.App.3d 222, 229.) In Dumas, the court noted that it would be anomalous to hold that a trash can next to a house may not be searched "but that an automobile parked immediately adjacent to it is subject to such a search, inasmuch as an automobile undeniably evokes at least as great an an expectation of owner privacy as a trash can." (People v. Dumas, supra, 9 Cal.3d at p. 884.)

Under California law, trash placed in a trash can in one's back yard or in front of one's house where it can be collected is not abandoned property outside the scope of protection of the

state Constitution. In People v. Edwards (1969) 71 Cal.2d 1096, our Supreme Court held that trash placed in a trash can located in the defendant's back yard was not abandoned, and thus not placed beyond the protection of the Fourth Amendment and article I, section 19, of the California Constitution. (Id., at pp. 1104-1105.) As stated in Edwards: "The marijuana itself was not visible without 'rummaging' in the receptacle. So far as appears defendants alone resided at the house. In the light of the combined facts and circumstances it appears that defendants exhibited an expectation of privacy, and we believe that expectation was reasonable under the circumstances of the case. We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse

and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere." (Id., at p. 1104.)

And in People v. Krivda (1971) 5 Cal.3d 357, our Supreme Court held that a trash can placed in front of the defendant's house for collection of its contents was not abandoned property placed beyond the protection of the Fourth Amendment and the state Constitution.[2/] While it may be reasonable to anticipate that nonpolice third persons may rummage through and scavenge from one's trash barrels despite local ordinances prohibiting such behavior, the probability

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2. The United States Supreme Court vacated and remanded Krivda, to inquire as to whether the decision was based on federal or state constitutional grounds. (California v. Krivda (1972) 409 U.S. 33.) The court's opinion on remand (People v. Krivda (1973) 8 Cal.3d 623) adopted both federal and state constitutional grounds.

of that occurrence does not not necessarily create the same expectation that police would rummage through and retrieve evidence from one's trash barrels without a search warrant. (People v. Krivda, supra, 5 Cal. 3d at pp. 366-367.) The court expressed a concern against "encourag[ing] a practice whereby our citizens' trash can could be made the subject of police inspection without the protection of applying for and securing a search warrant." (People v. Krivda, supra, 5 Cal.3d at p. 367.)

While it appears logical to conclude that a tenant who places trash in a communal trash bin possesses less of a privacy expectation than one who places trash in a privately owned trash can such as in Edwards and Krivda, we are not prepared to adopt an "open fields" rule for communal trash bins, thereby eliminating the need for any particular showing of cause. (See Hester v. United States (1924) 265 U.S. 57, 58-59; People

v. Dumas, supra, 9 Cal.3d at p. 882.) Our position is supported by other appellate decisions concerning communal trash bin searches that have not distinguished Krivda solely on the difference between privately owned trash cans and communal trash bins. (People v. Parker, supra, 44 Cal.App.3d 222; People v. Stewart (1973) 34 Cal.App.3d 695.)

The court in Stewart recognized the logic of concluding that an apartment house tenant who uses communal trash bins has less reason to believe what he deposits will remain

private than does a resident of a single family dwelling using a privately owned trash can. (Id., at p. 700.)[3/] But Stewart recognized that "what further distinguishes [Stewart] from Krivda, however, is the fact that police here had probable cause to believe the trash cans contained evidence of a crime." (Ibid.) Krivda "did not preclude the possibility that a warrantless search of the trash can would have been valid had probable cause existed to support it." (People v. Dumas, supra, 9 Cal.3d at p. 884.)

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3. We note, however, that the California Supreme Court depublished People v. Smith (1975) 52 Cal.App.3d 514, which stated that "[u]sers of the communal receptacle . . . . have no more reason than the householder [in a single family dwelling] to expect their trash to be examined by police officers." (Id., at p. 522.)

Similarly, the court in Parker upheld the warrantless search of a communal trash bin due to the existence of probable cause. (People v. Parker, supra, 44 Cal.App.3d at p. 229.) The court stated: "We do not believe, however, that [Krivda] thereby intended to draw any hard and fast distinction between trash which is at curbside and that which is still on the exterior premises of an apartment house. Rather, the distinction which the court drew was between 'fishing expeditions' where the officer lacked probable cause to believe the trash can contained contraband and those situations where such probable cause existed, as was the case herein. Again, analogy with the automobile cases is helpful. Searches of vehicles have been upheld not only where the vehicle was in transit on the highway, but where it was parked at a curb, adjacent to or far from the defendant's home, and even when it was parked in a common garage

area of the defendant's apartment. [Citation.] Parallel reasoning requires a similar result to apply to trash in a common receptacle adjacent to a large apartment." (People v. Parker, supra, 44 Cal.App.3d at p. 231.)

We agree with Stewart and Parker that the rationale cited for relaxing the warrant requirement for automobile searches applies to communal trash bin searches. As stated by the court in Parker: "Materials placed in trash cans, being placed there for removal and disposal, are highly portable. While trash is typically removed on a specific ascertainable day and within certain circumscribed hours, it is just as typically not subject to the security precautions people normally take with respect to property they intend to keep. Trash placed in a common receptacle used by multiple apartment dwellers is

especially likely to be tampered with. Trespassory incursions into exterior trash receptacles by human and animal foragers, although unwelcome are not totally unexpected. People normally do not take particular pains to assure that the contents of their trash bins will not be damaged by the weather and the likelihood of weather damage is increased when many people regularly use the receptacle." (People v. Parker, supra, 44 Cal.App.3d at p. 230.) Because the characteristics of trash receptacles are those "which diminish the reasonable expectation of privacy as to their contents and make it impractical to obtain a warrant, minimal additional circumstances need be shown by

the People in any particular case to justify their dispensing with a warrant." (Ibid.)

We now consider the validity of these decisions in light of the California Supreme Court's conclusion that article I, section 28, subdivision (d), of the state Constitution, the "Truth in Evidence" provision of the Victim's Bill of Rights (Proposition 8), abrogates "a defendant's right to object to and suppress evidence seized in violation of the California but not the federal, Constitution." (In re Lance W. (1985) 37 Cal.3d 873, 879.) While various federal courts have held that trash placed in an area where it can be collected is abandoned property that it not protected by the Fourth Amendment, those decisions are not binding on this

court since the United States Supreme Court has never squarely ruled on the issue. (See United States v. Sumpter (8th Cir. 1982) 669 F.2d 1215, 1221; United States v. Vahalik (5th Cir. 1979) 606 F.2d 99, 100-101; United States v. Shelby (7th Cir. 1978) 573 F.2d 971, 973-974; United States v. Crowell (4th Cir. 1978) 586 F.2d 1020, 1024-1025; Magda v. Benson (6th Cir. 1976) 536 F. 2d 111, 112-113; United States v. Mustone (1st Cir. 1972) 469 F.2d 970, 972; United States v. Dzialak (2d Cir. 1971) 441 F.2d 212, 215; United States v. Minker (3d Cir. 1962) 312 F.2d 632, 634-635.)

Because Edwards and Krivda are based on both federal and state constitutional provisions, we find them to be valid and binding authority that

this court must follow until either the California or United States Supreme Court rules on the issue. Since the search of the trash bin was without a warrant, the burden was on the prosecution to show proper justification. (People v. Edwards, supra, 71 Cal.2d at p. 1099.)

The prosecution contends that the trash was abandoned and hence fell outside the protection of the Fourth Amendment when it was placed in the communal trash bin. (Abel v. United States (1960) 362 U.S. 217.) In Abel, officers arrested defendant in his hotel room and waited while defendant packed his bags and checked out of the hotel. Defendant left behind certain items in the waste basket in the hotel room. Abel held that it was not "unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with

crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were bona vacantia. There can be nothing unlawful in the Government's appropriation of such abandoned property." (Id., at p. 241.)

We distinguish Abel on its facts. Abel simply held that a defendant, after checking out of a hotel, retained no privacy expectation in the trash he left behind in the hotel room trash can. In the case at bench, the items were not left behind in a vacated hotel room as in Abel, but were placed in a trash bin in the garage of an apartment building. Under the line of California cases which classsifies trash cans under the secondary level of protection applicable to automobiles in determining Fourth Amendment search

and seizure issues (see People v. Dumas, supra, 9 Cal.3d at p. 882, fn. 9), the burden rested on the prosecution to show that the trash had been abandoned under the facts of the case, or to show that the officers had probable cause to believe that the trash bin contained contraband. (See People v. Superior Court (1972) 23 Cal.App.3d 1004, which held the defendant had abandoned her trash bag by placing it in her neighbor's garbage can, thereby forsaking any reasonable expectation of privacy as to its contents.)

Here, the prosecution made no factual showing that the trash in the bin hand been abandoned. The placement of one's trash in a communal bin in the subterranean garage of one's apartment building is not necessarily an abandonment of one's trash to the police or general

public. As our Supreme Court stated in Krivda: "[H]ad defendants simply cast their trash onto the sidewalk for anyone to pick over and cart away, we would have no difficulty finding that defendants had thereby forsaken any reasonable expectation of privacy with respect thereto. (Fn. omitted.]" (5 Cal.3d at pp. 365-366.) But the existence of many municipal "ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated" (ibid.), would appear to refute the view that the contents of one's trash bags in the trash bins become public property when placed in the bin for collection.

However, we disagree with defendant's argument that he had a heightened expectation of privacy in the trash bin because it was located within the "curtilage" of his apartment. People v. Terry

(1964) 61 Cal.2d 137, 152-153, provides contrary authority. In Terry, police officers observed what appeared to be a marijuana cigarette on the dashboard of the defendant's car. Like the trash bin herein, the automobile in Terry was located in the subterranean garage of the defendant's apartment building. In upholding the warrantless search of the car due to the existence of probable cause, Terry stated, "Apparently the apartment garage was a common area; the officers did not commit a trespass by entering it." (Id., at p. 152.) In People v. Dumas, supra, 9 Cal.3d 871, our Supreme Court noted that the police in Krivda, unlike in Terry, lacked probable cause to justify the warrantless search. "Krivda . . . did not preclude the possibility that a warrantless search of the trash can would have been valid had

probable cause existed to support it. In this light, no conflict with Terry appears, and it is clear that an automobile does not become immune from the Carrol [v. United States (1925) 267 U.S. 132] rule permitting warrantless search simply because it is parked on or near a defendant's premises. [Citation.]" (Id., at p. 884.)

In the instant case, the trash at issue was not in plain view, but was located halfway down in the trash bin, in a paper bag. The contents of the bag were not visible without emptying or searching through the bin and the bag. The fact that the bag was "commingled" with a quantity of trash belonging to others, does not distinguish Edwards, because the bag's contents "had [not] lost its identity and meaning by becoming part of a large conglomeration of trash

elsewhere." (People v. Edwards, supra, 71 Cal.2d at p. 1104.)

At the time of their search of the trash bin, the officers had only the hearsay information provided by the informant coupled with the knowledge that the telephone number was registered to a Peter Ryan at the same address where defendant had been arrested for bookmaking three years before. Because there is nothing in the record to show that the informant was a citizen informant who was either a victim or a witness of a crime, other than the officer's conclusory use of the term "citizen informant," there must have been some corroboration of the informant's tip in order for there to have been probable cause. (See People v. Smith (1976) 17 Cal.3d 845, 852.) We find that the record is insufficient to establish the probability that evidence

of bookmaking would be found in the trash bin. Had the police waited to search the trash bin until after they observed the defendant entering the apartment and after they overheard the telephone conversation concerning the point spreads, we would reach a different result.

B. The Search Warrant is Supported by Probable Cause, Even Excluding the Items Seized from the Trash Bin

The standard by which a magistrate must determine the existence of probable cause for the issuance of a search warrant was explained in Illinois v. Gates (1983) 462 U.S. 213, 235, as follows: "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's

decision. While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' [Citations.]"

With respect to the test for determining the credibility of anonymous informants and the accuracy of their information, Gates abandoned the two-pronged test established by Aguilar v. Texas (1964) 378 U.S. 108, and Spinelli v. United States (1969) 393 U.S. 410, and adopted a test based on the totality of the circumstances. Gates provides: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . .

including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed. [Citation.]" (Illinois v. Gates, supra, 462 U.S. at pp. 238-239.) The court repeated its often quoted statement: "A magistrate's 'determination or probable cause should be paid great deference by reviewing courts.' [Citation.]" (Id., at p. 236.)

We find that the search warrant authorizing the search of defendant's apartment was properly supported by probable cause. Viewing the evidence as a whole, we conclude that sufficient

evidence existed to determine a significant probability that evidence of bookmaking would be found in the apartment, even excluding the items seized from the trash bin.

A review of the facts in Gates is helpful to our determination that probable cause existed herein. In Gates, the police received an anonymous letter detailing the manner in which defendants moved drugs between Florida and Illinois, and predicted a trip on May 3. Police surveillance confirmed such a trip. The court upheld the search warrant, stressing the value of the corroboration of the details of the informant's tip: "The corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he

would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. '[B]ecause an informant is right about some things, he is more probably right about other facts' [citation] -- including the claim regarding the Gateses' illegal activity. This may well not be the type of 'reliability' or 'veracity' necessary to satisfy some views of the 'varacity prong' of Spinelli [v. United States, supra, 393 U.S. 410], but we think it suffices for the practical, common-sense judgment called for in making a probable-cause determination. It is enough, for purposes of assessing probable cause, that '[c]orroboration through other sources of information reduced the chances of a reckless of prevaricating tale,' thus providing 'a substantial basis for crediting

the hearsay.' [Citation.]" (Illinois v. Gates, supra, 462 U.S. at pp. 244-245.)

In the case at bench, the informant's tip was corroborated in significant part through independent police investigation. First, defendant's police record showed that he had previously been arrested for bookmaking activities at apartment #8, the same apartment that was registered with the telephone company for the number provided by the informant. While defendant contends that People v. Chapman (1984) 36 Cal.3d 98, prohibits the police from using telephone company records to obtain the names and addresses of customers with unlisted telephone numbers, we find that there was a Fourth Amendment violation here. As a consequence of Lance W., the police did not need a warrant to obtain the address from the

telephone company. Chapman explicitly recognized that such a requirement does not exist under federal law, citing Smith v. Maryland (1979) 442 U.S. 735. (People v. Chapman, supra, 36 Cal.3d at 107, fn. 6; see People v. Lissauer (1985) 169 Cal.App.3d 413.) In addition, defendant cannot complain of the inevitable discovery of the address through his arrest record.

Second, the informant's tip that defendant was in "the location" where the telephone was located between certain hours was further corroborated when defendant was seen parking his car in the apartment building and entering apartment #8. Although the telephone and utilities for that apartment were listed in the name of Peter Ryan rather than in defendant's name, Shorb's affidavit states that this is consistent

with the conducting of bookmaking activities at that location.

Moreover, the informant's tip that defendant was taking bets over the telephone for professional football games was partially corroborated when Shorb, who dialed the number provided by the informant and registered to the apartment entered by defendant, overheard a conversation between the informant and an unknown male concerning the point spreads for professional football games.

We are not persuaded by defendant's argument that the fact he was seen entering the apartment during the predicted hours and that the officer overheard a the telephone conversation concerning point spreads do not constitute corroboration because there was nothing criminal about either event. However, the corroboration of an

anonymous informant's tip does not require a showing of criminal activity: "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." (Illinois v. Gates, supra, 462 U.S. at pp. 243-244, fn. 13.) We note that here, as in Gates, the corroborating evidence of "'seemingly innocent activity became suspicious in light of the initial tip.'" (Ibid.)

Our determination of the existence of probable cause for the issuance of the search warrant is not altered even if the incriminating items found in the trash bin are excluded. The other evidence presented by the prosecution are both substantial and independent

evidence that cannot be deemed tainted by any alleged illegality connected with the search of the trash bin.

Accordingly, we reverse the order of dismissal and remand for further proceedings consistent with the views expressed herein.

CERTIFIED FOR PUBLICATION

THOMPSON, J.

We concur:

LILLIE, P. J.

JOHNSON, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. PETER ROONEY, Defendant and Appellant.	No. B006936 (Super.Ct. No. A088619) ORDER MODIFYING OPINION

THE COURT:

It is ordered that the opinion in the above entitled matter filed December 13, 1985, be modified in the following respects:

Delete from page 23, lines 13, 14 and 15 the following:

(Court of Appeal, Second Dist., Filed December 19, 1985, Clay Robbins, Jr., Clerk.)

"We concur:

LILLIE, P. J.

JOHNSON, J."

and substitute therefore the following:

I concur:

JOHNSON, J.

I concur in the judgment only.

LILLIE, P. J.

CERTIFIED FOR PUBLICATION

OFFICE OF THE CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

CLAY ROBBINS, JR., CLERK

DIVISION: 7 B006936

Office of the District Attorney
Richard W. Gerry
849 South Broadway
11th Floor
Los Angeles, CA 90014

JAN 7 - 1986

RE: People of the State of Calif.
vs.
Rooney, Peter
2 Criminal B006936
Los Angeles No. A088619

THE COURT:

Petitions for rehearing denied.

I would grant; Lillie, PJ.

O R D E R D E N Y I N G R E V I E W

AFTER JUDGMENT BY THE

COURT OF APPEAL

2nd District, Division 7, No. B006936

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

I N B A N K

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PEOPLE

v.

PETER ROONEY

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Petitions for review DENIED.

Lucas, J. and Panelli, J., are of the opinion the petition should be granted.

BIRD

Chief Justice

(Supreme Court, Filed March 13, 1986, Laurence P. Gill, Clerk.)

OFFICE OF THE CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

CLAY ROBBINS, JR., CLERK

DIVISION: 7 B00693

Office of the District Attorney
Richard W. Gerry
849 South Broadway
11th Floor
Los Angeles, CA 90014

RE: People of the State of Calif.
vs.
Rooney, Peter MAR 20 1986
2 Criminal B006936
Los Angeles No. A088619

THE COURT: Application for stay of issuance of remittitur is granted.